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INLAND PAPERBOARD AND PACKAGING,
INC. f/k/a INLAND CONTAINER CORP.,

Complainant,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

Complaint as to municipal taxes and
franchise fees improperly charged to the
complainant in Leyden Township, Illinois.

CHIEF CLERK'S OFFICE

No. 00-0385

COMMONWEALTH EDISON COMPANY'S
MEMORANDUM IN RESPONSE TO INLAND PAPERBOARD AND
PACKAGING, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Commonwealth Edison Company ("ComEd"), by its attorneys, Foley & Lardner, respectfully submits this Response to Inland Paperboard and Packaging, Inc.'s ("Inland's") Motion for Partial Summary Judgment. For the reasons set forth herein, Inland's Motion should be denied.

INTRODUCTION

Inland filed a Formal Complaint with the Illinois Commerce Commission (the "Commission") on May 26, 2000 and amended that Complaint on June 23, 2000. The Amended Complaint ("Complaint") alleges that ComEd wrongfully collected Village of Franklin Park ("Village") municipal taxes and franchise costs from Inland. Complainant seeks to recover alleged municipal tax overcharges paid from December 5, 1989 through October 30, 1997 and alleged franchise cost overcharges paid from April 4, 1995 through October 30, 1997. Inland contends that these charges were improper because the property receiving electric service was located not within the municipal boundaries of the Village, but in unincorporated Leyden Township.

ComEd moved to dismiss the Complaint in part on the ground that the applicable statute of limitation prohibits recovery for municipal taxes collected by ComEd prior to September 15, 1996, three years prior to the date of Inland's administrative complaint. On October 25, 2000, Hearing Examiner Casey granted ComEd's motion to dismiss that portion of Inland's Complaint relating to claims for municipal taxes allegedly improperly charged prior to September 15, 1996. On December 19, 2000, Inland moved for partial summary judgment on its remaining claim for franchise costs and for municipal taxes allegedly improperly charged after September 15, 1996. Inland argues that "there is no triable issue of fact regarding whether ComEd must refund those Municipal Taxes paid from September 15, 1996 through October 30, 1997 and Franchise Costs paid from April 4, 1995 through October 30, 1997 which were improperly charged by ComEd and paid by Inland." Motion for Partial Summary Judgment ("Motion") at 10-11. Inland's premise is that ComEd has admitted all allegations in Inland's Complaint by failing to file an answer in this matter. This argument does not withstand scrutiny under the plain language of the Illinois Administrative Code provision that Inland relies upon, Ill. Admin. Code tit. 83, § 200.180. Furthermore, not only does Inland's argument disregard ComEd's standard billing procedures, but Inland is estopped from arguing that ComEd wrongfully billed Inland for Village of Franklin Park municipal taxes and franchise costs.

DISCUSSION

A. ComEd Has Not Admitted The Allegations of Inland's Complaint

Inland contends that, pursuant to Section § 200.180 of the Illinois Administrative Code, "failing to answer or otherwise deny allegations as set forth by the complainant results in those allegations being admitted by the respondent." Motion at 6. Inland argues that ComEd has admitted Inland's allegations as true

because, while ComEd has filed a Motion to Dismiss a portion of the claimed damages (which was granted), it has not filed an answer to the Complaint. However, even a quick review of the provision that Inland relies upon demonstrates that Inland is incorrect. Title 83, § 200.180(a) of the Illinois Administrative Code provides:

Whenever the Hearing Examiner issues a ruling that a complaint provides a clear statement on the subject matter, scope of complaint, and basis thereof, answers to formal complaints shall be filed with the Commission within 21 days after the date on which the Commission serves notice of the Hearing Examiner's ruling upon the respondent, unless otherwise ordered. If any respondent fails to file an answer when required under this Section, allegations of fact as to such respondent will be considered admitted. If respondent does not file an answer, when no filing requirement exists, issue as to such respondent will be considered joined. Answers shall contain an explicit admission or denial of each allegation of the pleading to which they relate and a concise statement of the nature of any defense.

Ill. Admin. Code tit. 83, § 200.180. It is clear from the plain language of this provision that the Commission requires answers to formal complaints only when a Hearing Examiner issues a ruling that "a complaint provides a clear statement on the subject matter, scope of complaint, and basis thereof." Id. In other words, a respondent is not required to submit an answer to a formal complaint filed with the Commission unless the Hearing Examiner issues such a ruling.

The Hearing Examiner in the instant case has never issued the contemplated ruling that Inland's Complaint provides a clear statement on the subject matter, scope of complaint, and basis thereof. Therefore, ComEd was not and is not required to file an answer to the Complaint, and Inland's allegations are not deemed to be admitted by ComEd. Rather, § 200.180 indicates that issue as to ComEd is considered joined because ComEd has not filed an answer and no filing requirement exists.

Inland also appears to argue that, because ComEd sought to dismiss only a portion of Inland's Complaint, ComEd has admitted all allegations as to the remaining portion of Inland's claim. Not only is this incorrect for the reasons explained above,

but also because ComEd has made clear all along that it disputes Inland's remaining claim. Indeed, ComEd explicitly stated in its Reply Memorandum in Support of its Motion to Dismiss Inland's Complaint that "ComEd intends to vigorously defend itself on the merits because it has done nothing illegal or improper." Reply at 2-3.

"Summary judgment is a drastic means of disposing of litigation and should be employed only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Bloom Township High Sch. v. Illinois Commerce Comm'n, 309 Ill. App. 3d 163, 177, 722 N.E.2d 676, 687 (1st Dist. 1999) (emphasis added). In cases such as this, the complainant bears the burden of proof that ComEd wrongfully imposed charges. See, e.g., Citizens' Util. Bd. v. Illinois Commerce Comm'n, 315 Ill. App. 3d 928, 935, 735 N.E.2d 92, 98 (3^d Dist. 2000). Inland has not even attempted to meet that burden; it has presented no evidence supporting its motion. Because ComEd has not admitted the allegations of Inland's Complaint, and Inland has presented no evidence supporting their motion, several issues of fact exist with respect to Inland's remaining claim. Therefore, summary judgment is inappropriate.

Summary judgment is also inappropriate because no discovery has been taken in this proceeding. ComEd has not yet requested that Inland provide ComEd with documents still in Inland's possession regarding the facts at issue. If this matter proceeds toward a hearing, ComEd fully intends to submit such data requests.

B. ComEd Did Not Wrongfully Impose Municipal Taxes and Franchise Costs

Inland alleges that ComEd wrongfully imposed charges for Village of Franklin Park municipal tax and franchise costs on Inland. ComEd disputes this assertion.

**1. Inland Bears the Burden of Providing ComEd
With Correct Information Regarding Its Location**

The Public Utilities Act and the regulations promulgated by the Commission thereunder define the relationship between customers and utilities. Part of that definition entails assigning certain responsibilities to customers and certain responsibilities to utilities. One of the responsibilities assigned to customers is providing sufficient information about themselves to utilities.

Consistent with this burden, Section 1.02 of ComEd's "Information and Requirements for the Supply of Electric Service" (the "Rule Book"), which is on file with the Commission as Ill. C. C. No. 9 (and which is Ex. A), makes clear that when applying for electric service, the customer is responsible for providing sufficient information to ComEd to show the conditions under which service will be required, including the customer's location. See Rule Book, Ex. A, § 1.02. Moreover, consistent with the Rule Book, ComEd's general procedure when a customer initiates service is that the customer must give ComEd information about the customer's location. See Declaration of Robert L. Jacobs, Ex. B. Thus, ComEd does not obtain information regarding a customer's location independently; the information comes from the customer itself.

Placing the burden on customers to provide information about themselves makes good sense, given that customers have better knowledge about themselves than do utilities. ComEd has no way of independently knowing on an ongoing basis the location of millions of customers. It must rely on customers to accurately provide it with such information. See Manor Homes v. Commonwealth Edison Company, ICC No. 95-0310, 1998 Ill. PUC LEXIS 591, at *10 (July 13, 1998) ("The Association . . . would have the Commission find that ComEd had a duty to independently apprise itself of . . . the position of the [Complainant's] various properties. . . . The merits of

imposing such an onerous duty on ComEd has been answered by [the Commission previously when it stated that] . . . [s]uch a duty or burden when applied to millions of customers would be unreasonable and unfair to [ComEd].") Here, ComEd had to rely on Inland because the only way that ComEd could know Inland's location was through information provided by Inland.

**2. Inland Is Estopped From Recovering
Municipal Taxes and Franchise Costs**

Inland contends that it was a customer of ComEd from December 5, 1989 through October 30, 1997, and that during this period, ComEd wrongfully charged Village municipal taxes and franchise costs when Inland was in fact not located within the Village.¹ Yet during this eight-year period, Inland failed to provide ComEd with correct information regarding its location.

Because Inland had a duty to provide correct information to ComEd regarding its location, and failed to do so, Inland is estopped from making this argument and from recovering municipal taxes and franchise costs. The elements of estoppel are (1) conduct or statements amounting to a misrepresentation of material fact; (2) the party against whom estoppel is alleged had knowledge at the time the conduct or statements occurred that they were untrue; (3) the falsity of the representations was unknown to the party asserting estoppel at the time they were relied upon; (4) the party estopped must have intended or reasonably expected that the conduct or words would be relied upon; (5) the party asserting estoppel must have relied in good faith on the misrepresentation to its detriment; and (6) the party asserting estoppel must have so acted because of such conduct and must have been prejudiced thereby. See

¹ As for municipal taxes, Inland now seeks only those taxes imposed between September 15, 1996, and October 30, 1997, due to the Hearing Examiner's ruling on ComEd's Motion to Dismiss.

Elson v. State Farm Fire & Cas. Co., 295 Ill. App. 3d 1, 15-16, 691 N.E.2d 807, 817 (1st Dist. 1998).

Here, based upon ComEd's practices and procedures, Inland failed to correctly represent its true location to ComEd, which had no knowledge of Inland's actual location. Inland did so with the reasonable expectation that ComEd would act upon such information, and ComEd did act upon that information in good faith. Such reliance was to ComEd's detriment because ComEd is merely a conduit for the collection of the municipal taxes and franchise costs at issue here. The Village ordinance which authorizes the municipal tax as to customers within Franklin Park corporate limits prohibits ComEd from recovering municipal taxes back from the Village more than three years after the due date of such taxes. See Franklin Park, Ill., Ordinance No. 8990 G 12 (1989) ("[N]o action to recover any amount of tax due under the provisions of this Ordinance shall be commenced more than three (3) years after the due date of such amount." (attached as Ex. C). ComEd is barred from recovering municipal taxes back from the Village more than three years after the due date of such taxes. Accordingly, Inland's misrepresentations have prejudiced ComEd, and Inland should be estopped from recovering the municipal taxes and franchise costs at issue.

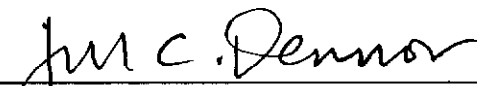
CONCLUSION

For the foregoing reasons, Commonwealth Edison Company requests that the Illinois Commerce Commission deny Inland's Motion for Partial Summary Judgment.

Dated: February 26, 2001

Respectfully submitted,

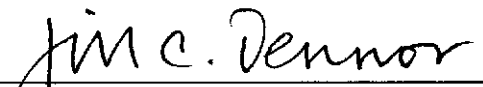
COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

I, Jill C. Dennor, an attorney, hereby certify that on February 26, 2001, I caused a copy of the attached Commonwealth Edison Company's Memorandum in Response to Inland Paperboard and Packaging, Inc.'s Motion for Partial Summary Judgment to be served via hand delivery on Hearing Examiner Philip A. Casey and on Inland Paperboard and Packaging, Inc.



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